

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2069

To be argued by
MARVIN LEVINE

In The
United States Court of Appeals
For The Second Circuit

FRED SCHULMAN,
Plaintiff-Appellant,

-against-

UNITED STATES OF AMERICA,
Defendant-Appellee.

*On Appeal from the United States District Court for the
Southern District of New York.*

BRIEF FOR PLAINTIFF-APPELLANT

LEVINE & POZNANSKY
Attorneys for Plaintiff-Appellant
1350 Avenue of the Americas
New York, New York 10019
(212) 581-3264

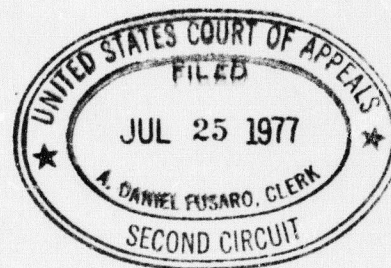


TABLE OF CONTENTS

	Page
Preliminary Statement	1
Issue	1
Statement of Facts	2
Argument: Appellant's Sixth Amendment right to intelligently retain counsel was violated by the wilfull suppression by the prosecutor of information that coun- sel was under the same type of inves- tigation as appellant by the same spec- ial agent and drug enforcement agency unit.	6
Conclusion	11

TABLE OF CITATIONS

Cases Cited:

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed. 2d 215 (1963)	11
Morgan v. United States, 396 F.2d 110 (2d Cir. 1968)	10
Ray v. Rose, 491 F.2d 285 (6th Cir. 1974) .	10
United States v. Armedo Sarmiento, 524 F.2d 591 (2nd Cir. 1975)	10
United States v. Berry, 487 F.2d 448 (2d Cir. 1973)	9
United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976)	9

Contents

	Page
United States v. Foster, 469 F.2d 1 (1st Cir. 1972)	9
United States v. Giglio, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)	8
United States v. Keogh, 391 F.2d 130 (2d Cir. 1968)	10, 11
United States v. McCord, 509 F.2d 334 (D.C. 1974)	10
United States v. Olsen, 453 F.2d 612 (2d Cir. 1971)	10
United States v. Polisi, 416 F.2d 573 (2d Cir. 1971)	8
United States ex rel Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965)	6
 <u>Statutes Cited:</u>	
28 U.S.C. §2255	1, 2
 <u>U.S. Constitution Cited:</u>	
Sixth Amendment	2, 6

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X
FRED SCHULMAN, :
Appellant, :
-against- :
UNITED STATES OF AMERICA, :
Appellee. :
-----X

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

Appellant submits this brief in support of his appeal from the order of United States District Court for Southern District of New York (Knapp, J.) entered the 15th day of June, 1977, denying his motion pursuant to 28 U.S.C. 2255 to vacate the judgment of conviction entered against him on the 26th day of May, 1977, sentencing him to a two year prison term on his conviction by a jury of conspiracy and illegal possession of cocaine. Appellant is serving his sentence at Danberry Correctional Facility.

ISSUE

1. Is due process of law and the Constitutional right to effect aid of counsel of choice violated by Government suppression of a narcotics investigation of defendant's attorney, by the same agents who

investigated the case against a defendant?

2. Is a Defendant entitled to notice from the Government that his attorney is under investigation for the same type narcotics charges, in order that he may knowingly and intelligently make a choice whether to retain said attorney?

STATEMENT OF FACTS

On the 26th day of May, 1977, appellant was sentenced to a two and one-half year term by the United States District Court for the Southern District of New York (Knapp, J.) for the crime of conspiracy and illegal possession of cocaine. Appellant was represented at trial by James Siff, Esq.

On the 4th day of February, 1977, appellant's pro se application pursuant to 28 U.S.C. 2255 was filed in the United States District Court for the Southern District to vacate the conviction on grounds that appellant's Sixth Amendment right to counsel was violated by reason of the failure to make disclosure to him that counsel, himself, while representing appellant, was the subject of a similar narcotics investigation by the same special agents, which ultimately lead to the indictment of counsel, his conviction and resignation from the bar. (15a-24a)* The Government filed its answer (25a-28a) and LEVINE & POZNANSKY filed a reply on behalf of appellant. (31a-35a) Judge Whitman Knapp thereupon

*Page numbers refer to appellant's appendix.

ordered an evidentiary hearing at which James Siff, the attorney for appellant throughout the proceedings, testified.

At the hearing, Siff testified that he represented appellant on three counts of conspiracy and two counts of possession of narcotics. Assistant United States Attorney Mamaro offered a correction that the indictment charged two counts of conspiracy, not three. (56a) The crime allegedly occurred on June 7th, 1972, but appellant was not indicted until June 6th, 1974. (57a) Appellant surrendered around August 4th or 5th, 1975. Siff had been retained two days before. He did not represent the codefendant. (58a)

The case went to trial in February of 1976 and concluded on February 6th. (59a) He represented appellant on the 26th day of May, 1976 on sentencing. Subsequently, on the 21st day of July, 1976, Mr. Siff, himself, was indicted for conspiracy to sell narcotics and for a sale of cocaine. (60a)

The narcotics offenses charged to Mr. Siff allegedly occurred from the 15th day of August, 1973 through the 1st day of May, 1974, to which he pleaded guilty. The offenses occurred prior to his representation of appellant. (61a)

The same Drug Enforcement Agency unit was in charge of the investigation of both appellant and Mr. Siff and Agent Hall was in charge of both investigations. (61a-62a).

Assistant United States Attorney Mamaro conceded on the record that he was aware of the ongoing investigation of Mr. Siff during the

time Mr. Siff represented appellant, including trial and sentence. (63a)

In August or September of 1976, he learned that his conversations had been electronically recorded on April 9th and 11th, 1975. He gained this information during the disclosure phase of a case he handled for another client. Drug Enforcement Agents Sullivan and Crawford were in Court when he surrendered appellant. (67a) He learned during the disclosure phase of his own case that his conversations with Robert Lubach, a Government informer, had been taped. The latter had been equipped with a recording device. (70a)

The charges ultimately brought against him were similar to those against appellant. (P.21-2) He felt that he had been indicted because of his vigorous cross-examination of Special Agent Hall at appellant's trial. (73a)

On February 26th, 1976, during the course of his representation of Barry Williams, in the United States District Court for the Eastern District of New York, he learned through disclosure that Robert Pincus, a friend for fifteen years and for whose father, a Brooklyn lawyer, he had worked, was a special confidential informant. Among the tapes made available to him during the course of his representation of Williams, was a call between Pincus and Jeffrey Dali, who was to become his codefendant. He knew he had purchased narcotics from Pincus in 1973 and 1974. He was the one who had introduced Dali and Pincus. When he examined this discovery material, he knew something was brewing. (75a)

On October 28th, 1975, he told Lubach that he suspected Pincus

taped him in April of 1975. (78a) In April of 1975, Pincus tried to get Siff to arrange a three thousand dollar buy. (79a) He was suspicious that he was the target of an investigation as far back as April of 1975. (80a)

Siff testified that on the 26th day of February, 1976, Lubach came to his home and told him that he had been arrested and the Drug Enforcement Administration wanted him to cooperate. He felt that Lubach was luring him into attempting to obstruct justice. He told Lubach to tell the Government that he, Siff, had been a drug user for ten years, if it would help him. From February 26th, 1976, he had no doubt he was a target of an investigation. (86a-88a)

Another defendant whom Mr. Siff represented after his indictment, was given notice of the charges against Mr. Siff and waived any possible conflict of interest and his conviction was affirmed. (93a) He told appellant of his problem after sentence on a visit to Danbury between June 1st, 1976 and July 21st, 1976.

The witness offered his opinion that he had vigorously represented appellant, despite his awareness of a pending investigation of him. (98a-99a)

On cross-examination, he testified that he consulted with his lawyer on his own case in July of 1976. (102a) He testified that he did not appeal appellant's conviction because he did not find appealable issues. (105a)

On redirect examination, he testified that he was acquainted

with Lubach since 1959 and represented him on civil matters. (111a)

Judge Knapp denied appellant's motion in an opinion that failed to take into account the Constitutional consequences of the deliberate concealment by the prosecutor of facts material to the choice of retained counsel made by appellant. (118a-122a)

ARGUMENT

APPELLANT'S SIXTH AMENDMENT RIGHT TO INTELLIGENTLY RETAIN COUNSEL WAS VIOLATED BY THE WILFULL SUPPRESSION BY THE PROSECUTOR OF INFORMATION THAT COUNSEL WAS UNDER THE SAME TYPE OF INVESTIGATION AS APPELLANT BY THE SAME SPECIAL AGENT AND DRUG ENFORCEMENT AGENCY UNIT.

The right to retain counsel of one's own choosing is secured by the Sixth Amendment to the Constitution and is absolute. Counsel may not be forced upon an unwilling defendant and where it is done, the judgment of conviction becomes void, without need to show prejudice. The reason is that a defendant "must have complete confidence in his counsel" United States ex rel Maldonado, v. Denno, 348 F. 2d 12 (2nd Circ., 1965) It is strongly urged that the same result obtains, where the prosecutor willfully withholds essential information from a defendant so that he is unable to make an intelligent choice of counsel in whom his "confidence" will be "complete."

Assistant United States Attorney Mamaro conceded on the record that he was aware during appellant's trial that James Siff, appellant's

attorney, was under investigation for trafficking in narcotics by the same Drug Enforcement Unit, headed by the same Special Agent, Hall, who conducted the investigation of appellant. Mr. Siff testified that he suspected that he was under such investigation, as far back as April of 1975, ten months before the trial, and that he had even been electronically taped. He certainly was aware of his violations of the narcotics laws and was a probable target. The investigation of Mr. Siff was not disclosed to appellant, since Mr. Mamaro elected to conceal this information. Perhaps he was not ready to begin the formal prosecution against James Siff or perhaps he did not want to disrupt the prosecution against appellant by making a disclosure, that might well have induced appellant to seek a continuance of the trial to abide his retention of new counsel. In any event, whatever might have been Mr. Mamaro's reason for silence, appellant did not learn of the serious difficulties of his lawyer until after sentence. It is interesting to note that at the hearing conducted in the Court below, Mr. Siff testified that subsequent to his indictment, another client was asked by the Court whether he wished to waive his right to secure new counsel and he replied affirmatively. Under such circumstances, the United States Court of Appeals rejected his claim of conflict of interest with counsel and affirmed the conviction. However, appellant was never given any choice in view of the silence of Mr. Mamaro. Therefore, his conviction should be vacated.

The federal courts are dedicated to the proposition that the

wilfull suppression of material evidence by the Government requires that a new trial be granted. United States v. Polisi, 416 F. 2d 573 (2nd Circ., 1971) This is true even if the information deliberately suppressed merely bears on the issue of the credibility of the prosecution witness. United States v. Giglio, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed. 2d 104 (1972). The same result should follow where the information deliberately concealed by the prosecutor bears on the issue of the desirability of retaining particular counsel.

It is common knowledge that persons under investigation for drug crimes often cooperate with the Government, in return for leniency. Thus, it would be less than wise for a person charged with violation of the federal narcotic laws to retain counsel who might be tempted to curry favor with the Government in return for a tactical advantage in his own case. Under such circumstances, appellant was entitled to the information concerning his attorney so that he could make a knowing and intelligent choice whether to retain new counsel. Appellant had a right to full disclosure of the investigation of his attorney, so he could make an intelligent choice.

Where there is any possibility of conflict of interests of counsel, "the trial court should (conduct) the most careful inquiry to satisfy itself that no conflict of interest would be likely to result and that the parties involved (have) no valid objection." The rule is, that "from the beginning, each (must) understand clearly the possibilities of a conflict of interest and waive any rights in connection with it."

United States v. DeBerry, 487 F.2d 448 (2nd Circ., 1973) Certainly, a defendant cannot be warned "from the beginning" of a possible conflict in interest, when he is not alerted to facts within the ken of the prosecutor, which the latter concededly deliberately concealed..."When a potential conflict of interest arises...the proper course of action for the trial judge is to conduct a hearing to determine whether a conflict exists to the degree that a defendant may be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment. The Defendant should be fully advised by the trial court of the facts underlying the potential conflict and be given the opportunity to express his views." United States v. Carrigan, 543 F. 2d 1053 (2nd Circ., 1976) The concealment of the salient facts from the appellant and the Court, precluded the inquiry required where the possibility of conflict appears.

Although a petitioner on a 2251 motion has the burden of proving by a preponderance of the evidence that he was denied effective assistance of counsel by a conflict...the accused need not delineate the precise manner in which he was prejudiced." United States v. Foster, 469 F. 2d 1 (1st Circ., 1972) It suffices for appellant to point out that he had the right to know the underlying facts concerning his attorney, so that he could take steps to assure himself that he would not be represented by an attorney who was a potential cooperator with the Government in return for personal leniency. Thus, in a real sense appellant was prejudiced by the deliberate concealment of the information he required

to make a choice. Moreover, the error is not cured by Mr. Siff's self-serving declarations that he vigorously championed appellant's cause. It must be noted that in most conflict cases a defendant has at least constructive notice of the possibility of a conflict, even where he is not apprehensive of all of the ramifications. Therefore, to prevail a constructively alerted defendant must show prejudice. In the case at bar, none of the underlying problems were within the conception of appellant, even to the minutest degree. Thus, the prior hearing required by a possible conflict could not be held. Morgan v. United States, 396 F.2d 110 (2nd Circ., 1968); United States v. Olsen, 453 F. 2d 612 (2nd Circ., 1971).

"The Sixth Amendment does give some protection to a criminal defendant's selection of retained counsel." United States v. Arredo-Sarmiento, 524 F. 2d 591 (2nd Circ., 1975) It must be pointed out that a conflict of interest is not limited to a pattern of representation of more than one defendant in a criminal trial. See, Footnote 64, United States v. McCord, 509 F.2d 334 (D.C. 1974) Where an attorney acts for a personal financial interest, to the detriment of his client, that may be sufficient to disqualify him. Ray v. Rose, 491 F.2d 285 (6th Circ. 1974)

The issue of conflict of interest in the case at bar must be considered in tandem with the prosecutorial misconduct, where the Assistant United States Attorney wilfully concealed evidence of a possible conflict of interest of counsel. Under such circumstances, a showing of prejudice need merely be minimal. United States v. Keogh, 391 F.2d 130

(2nd Circ., 1968) In the Keogh Case, Judge Friendly wrote:

"The easy cases - at least they now seem so- and where the prosecutor's suppression is 'deliberate,' by which we include not merely a considered decision to suppress, taken for the very purpose of obstructing but also a failure to disclose evidence whose high value to the defense count not have escaped the prosecutor's attention... Such cases rarely present a problem as to the degree of prejudice which must be shown; almost by definition the evidence is highly material."

Due process is clearly violated even if the evidence suppressed is not material to the issue of innocence or guilt. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963) Evidence bearing on the issue of the degree that a defendant would have confidence in counsel if disclosed, by the definition must be counted as material and the suppression of such information fatal to any resulting conviction. The colloidal combination of the two Constitutional violations, to wit, the infringement on the right to knowingly and intelligently retain counsel by deliberate suppression by the Government, can yield no other solution than a vacating of the judgment of conviction and a new trial being ordered.

CONCLUSION

THE JUDGMENT OF CONVICTION OF MAY 26TH, 1976
OF APPELLANT SHOULD BE SET ASIDE AND A NEW
TRIAL ORDERED.

Respectfully submitted,

MARVIN LEVINE,
OF COUNSEL

LEVINE & POZNANSKY
Attorneys for Appellant
1230 Sixth Avenue
New York, New York
(212) 581-3262

**COURT OF APPEALS
SECOND CIRCUIT**

FRED SCHULMAN,
Plaintiff-Appellant

- against -

UNITED STATES OF AMERICA,
Defendant-Appellee.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

SS.:

I, Reuben A. Shearer, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 211 West 144th Street, New York, New York 10030.

That on the **25th** day of **July** 19 **77** at **One St. Andrews Plaza**
deponent served the annexed ~~Affidavit~~ *Brin* **New York, N. Y. 10007** upon

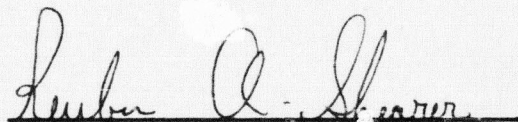
Robert Fiske

the *P* in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the *Brin* herein,

Sworn to before me, this
day of **July**, 19 **77** **25th**



ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1979



Reuben A. Shearer